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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JOHNATHAN CLAYTON, a minor, by CONNIE CLAYTON, his next friend; Steve Blakley, a minor by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor, by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James M. Beagle, his next friend; George Fox, a minor, by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend; Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley, Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,

Petitioners,

vs.

RICHARD M. PLACE; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; All in their individual and official capacities and Purdy R-2 School District,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

The fundamentalist churches in Purdy, Missouri preach and believe that dancing is a forbidden sin. As a direct result of pressure exerted by these churches, and for no discernible secular reason, the Purdy School Board has maintained Rule 502.29 of the Purdy R-2 School District which prohibits dancing on school premises. While this no-dancing rule does not refer to religion on its face, the Purdy School Board enforced and maintained the rule in 1986 for the actual purpose and with the primary effect of promoting the religious beliefs of the locally dominant fundamentalist churches. The question presented is:

Whether a public school rule, which is neutral on its face, but which is maintained and enforced for the actual purpose and with the primary effect of promoting the religious tenets of particular religious groups, violates the Establishment Clause of the First Amendment of the United States Constitution.

LIST OF PARTIES

The caption of the case contains the names of all parties, with the following modifications: pursuant to a stipulation by the parties, the district court dismissed David Mareth as a party-plaintiff, and substituted new school board member Launce Bunnell and new school superintendent Sheldon Buxton for former board member Jacqueline Stephens and former superintendent Richard Place, respectively, as party-defendants.

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RICHARD M. PLACE; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; All in their individual and official capacities and Purdy R-2 School District,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners herein, by and through counsel, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case entered on September 1, 1989.

OPINIONS BELOW

The opinion of the district court, which ruled in favor of petitioners, is reported at 690 F. Supp. 850 (W.D. Mo. 1988), and is reprinted in the Appendix, *infra*, A-1 – A-16. The panel decision of the United States Court of Appeals for the Eighth Circuit, which reversed the district court's ruling, is reported at 884 F.2d 376 (8th Cir. 1989), and is reprinted in the Appendix, *infra*, A-17 – A-27. By a 5-4 vote, the full United States Court of Appeals for the Eighth Circuit declined to rehear this case *en banc*. The opinions of the four circuit judges who dissented from the denial of rehearing, and would have reversed the panel opinion and reinstated the district court's decision, are reported at 889 F.2d 192 (8th Cir. 1989), and are reprinted in the Appendix, *infra*, A-28 – A-39.

JURISDICTION

The United States District Court for the Western District of Missouri issued its decision on August 1, 1988, holding that respondents' maintenance and enforcement of the Purdy School District's no-dancing rule violated the Establishment Clause of the First Amendment to the United States Constitution. On September 1, 1989, a panel

of the United States Court of Appeals for the Eighth Circuit reversed the trial court's decision. Thereafter, on November 17, 1989, a bare majority of the full United States Court of Appeals for the Eighth Circuit denied a timely petition for rehearing *en banc* by a 5-4 vote. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

A. Factual Background

Purdy, Missouri, is a small community in Southwest Missouri. Petitioners are a group of parents, children and taxpayers in the Purdy R-2 School District. Respondents are the Superintendent of the Purdy R-2 School District and members of the Purdy R-2 School Board. The dominant religious affiliation in the community is fundamentalist Christianity. There is a long and continuing history of religious activities in the public school system, including school prayer and Bible songs which continued into the late 1970's.

The fundamentalist churches in the Purdy community share the religious belief that social dancing contravenes the tenets of their religion and is sinful. Several of the preachers in the Purdy Ministerial Alliance have preached against dancing and have given religious counseling to congregants who dance. Rev. Ted Davis, the

chief spokesman for the opponents of school dancing, testified that he opposed dancing because it is "scripturally prohibited" and because the music associated with dancing is "satanic." The two Purdy Free Will Baptist Churches adhere to the doctrine that dancing is a sin. The First Assemblies of God Church of Purdy forbids dancing by members upon penalty of ex-communication. Members of the First Baptist Church of Purdy prayed for the souls of pro-dance advocates.

The focus of this case involved the Purdy School Board's maintenance and enforcement of its no-dancing rule. Rule 502.29 provides in relevant part:

> School dances are not authorized and school premises shall not be used for purposes of conducting a dance.

It was widely believed among Purdy residents that the rule was a direct embodiment of fundamentalist church doctrine. Because the rule is commonly viewed as a conscious endorsement of this religious tenet, the parents and students of minority faiths (Catholics, Mormons, and Lutherans) are made to feel that the school district considers their religious beliefs to be inferior to those of the majority.

Throughout the years, the school dancing issue has been the most controversial and divisive topic in the Purdy community. In 1978, a Purdy Student Council petition for a dance was voted down by the school board, 4-2. One of the two board members who voted for the dance, Jim Terry, admitted to catching a lot of "flak" from local ministers and was voted out of office in the next election.

Steve Ciafullo, the faculty sponsor for the Student Council in 1978, was terminated after the '78-79 school year because of complaints from people in the religious community over his support for dancing.

In 1984, three highly regarded high school seniors approached the school district superintendent, Dr. Place, about permitting a school sponsored dance. Dr. Place thought that school dances would be a positive experience for the students and agreed that it was time to change the rule. Dr. Place took the proposal to the president of the school board, Glen Garrett, who also agreed that it was time to change the rule but warned Dr. Place: "If it gets out in the community, there will be a lot of people [coming] out of the woodwork." The proposal died after board members Henderson, Keeling, and Negre opposed changing the rule.

In January of 1986, a group of parents approached Dr. Place about permitting a school-sponsored dance so the students would not have to drive long distances on unfamiliar roads to attend "unofficial" school dances. Because he felt that a school-sponsored dance was in the best interests of the children, Dr. Place could not justify the no-dancing rule other than by stating that Purdy was a conservative, religious community. When asked if the rule was in effect because the Baptists opposed dancing, Dr. Place smiled and answered: "Let's just say the Protestants."

In January and February of 1986, school board members were informally polled about a change in the no-dancing rule. School Board President Glen Garrett stated that the rule was in place because dancing was against

the religious convictions of a majority of the community. Board member Allen Keeling told one of the parents that he could not vote for school dancing because it was against the teachings of his church. Board member Jim Terry told another parent that he had voted for school dancing in the past and caught so much flak from the ministers that he did not want to go through that again. Board member Rex Henderson told a fellow member of the Macedonia Free Will Baptist Church that he would not vote to change the rule because dancing was "against our religion." Board member Art Negre told yet another parent that his church preached against dancing.

At the February 10, 1986, school board meeting, petitioners presented their proposal for a school-sponsored dance. No one on the board disputed the information showing different alternatives for funding and supervising school dances. Instead, the board simply said that the "majority" of people in Purdy did not support dancing. Rev. Davis was present and began to speak about his opposition to dancing but before he could continue School Board President Garrett cut him off and said he did not have to give any reasons for his opposition. When asked about the separation of church and state, Mr. Garrett shot back: "You better hope there's never a separation of God and school." The board then tabled further discussion of the issue until its March meeting.

After the February board meeting, Rev. Davis contacted his fellow ministers in the Purdy Ministerial Alliance regarding a "problem" that had arisen. The Purdy Ministerial Alliance consisted of the ministers of the fundamentalist Protestant churches in the Purdy community. Although the group had never spoken out on any public

issue before, the ministers felt very strongly about the school dance issue and they agreed to persuade their members to fight against any change in the no-dancing rule at the March school board meeting.

On Sunday, March 9, 1986, the ministers followed through on their agreement and told their congregants to attend the upcoming school board meeting. During the Sunday School session at the Macedonia Free Will Baptist Church, board member Henderson assured his congregation that there would be no school dancing as long as he was on the school board. Gary "Gabe" Pennell, who had moved to Purdy because of the community's strong religious beliefs as reflected in the no-dancing rule, also told the congregation to attend the March board meeting in opposition to school dancing. Rev. Winfrey of the First Baptist Church of Purdy exhorted his congregation to attend the board meeting to oppose school dancing. Rev. Dement of the First Assembly of God Church also reminded his congregation of the Church's opposition to dancing and encouraged them to attend the board meeting.

In response to the campaign of the Ministerial Alliance, between 250 and 400 people – easily the largest turnout in school board history – attended the school board meeting on March 10, 1986. Rev. Davis presented a copy of the Ministerial Alliance position statement to each member of the school board and read the document verbatim. At the end of his presentation, Rev. Davis asked for a standing show of force, at which time the vast majority of people in attendance rose in unison.

The board retired to a closed session and reached a unanimous consensus that the no-dancing rule would remain intact. None of the defendants acknowledged any discussion regarding the reasons behind the public display of anti-dance sentiment. As the district court found, however, it is doubtful "that it heard the complete story concerning the board members' deliberations of the rule and the religious significance of the opposition to dancing in Purdy." A-12.

On April 18, 1986, plaintiffs filed an application pursuant to the school district's rental policy for a parent-supervised dance. Rev. Winfrey testified that he opposes even the rental of school property for a dance. Although Dr. Place ordinarily handled such requests by himself, he referred this matter to the entire school board. The board met in a special closed session and summarily suspended the rental policy in its entirety. At a later meeting, the board purported to adopt a "no rental" policy. Since then, however, school premises have been used for non-school softball leagues, pick-up basketball games, and an exhibition donkey basketball game.

B. Proceedings in the Lower Courts

Throughout the latter half of 1986, plaintiffs communicated by letter with the Purdy School Board regarding its maintenance and enforcement of the no-dancing rule. In particular, plaintiffs objected to the religious nature of the board's actions. The board did not dispute this fact, but simply responded that they were doing what the "majority" wanted. After exhausting this informal avenue, plaintiffs brought suit under 42 U.S.C. § 1983 in the

United States District Court for the Western District of Missouri, Southwestern Division, seeking nominal damages and declaratory and injunctive relief.

After a four-day bench trial in June of 1988, at which each of the school board members defendants testified, the district court found that the board's after-the-fact efforts to justify their actions on secular grounds were not credible. Based on the overwhelming weight of the evidence, the district court found that the no-dancing rule was inherently religions to the Purdy R-2 School Board, and ruled that the board's maintenance and enforcement of the rule was motivated by impermissible religious purposes. The district court also ruled that the rule violated the "primary effect" prong of the Establishment Clause test, explaining that the rule placed an impermissible imprimatur of official approval on one particular religious belief.

On September 1, 1989, a panel of the United States Court of Appeals for the Eighth Circuit reversed the district court's decision. The panel decision focused on the fact that dancing is a secular activity and that the no-dancing rule was neutral on its face. A timely petition for rehearing was denied by the full United States Court of Appeals for the Eighth Circuit by a 5-4 vote. The four judges who dissented from the denial of rehearing made it clear that they believed the panel opinion should be vacated and that the district court opinion should be affirmed.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly stated that the Establishment Clause prohibits the government "from conveying or attempting to convey a message that . . . a particular religious belief is *favored* or *preferred.*" *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 106 L. Ed. 2d 472, 494 (1989) (emphasis in original) (citation omitted).[1] In upholding the actions of the Purdy School Board, however, the panel decision in this case essentially holds that public school boards may endorse and promote the religious beliefs of a locally dominant religious sect as official school policy so long as the school policy is "facially neutral." This ruling directly conflicts with the precedents of this Court and extends an invitation to governmental bodies across the Nation to actively promote the religious beliefs of the locally dominant sect as officially sanctioned governmental policy. The panel opinion merits immediate and careful review.

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[1] *See also Bowen v. Kendrick*, 478 U.S. 589, ___, 101 L. Ed. 2d 520, 550, 108 S. Ct. 2562 (1988) (O'Connor, J.) (governmental endorsement of "religious doctrines" violates Establishment Clause); *Edwards v. Aguillard*, 482 U.S. 578, 593, 96 L. Ed. 2d 510, 525, 107 S. Ct. 2573 (1987) (invalidating statute designed to advance a "particular religious belief"); *Wallace v. Jaffree*, 472 U.S. 38, 70, 86 L. Ed. 2d 29, 52, 105 S. Ct. 2479 (1985) (O'Connor, J., concurring) (Establishment Clause prohibits government from conveying a message that particular religious beliefs are "favored or preferred"); *Epperson v. Arkansas*, 393 U.S. 97, 106, 21 L. Ed. 2d 228, 235, 89 S. Ct. 266 (1968) (public school policy may not be "tailored to the principles of prohibition of any religious sect or dogma").

A. The Panel Decision Below Conflicts With the Decisions of This Court

The panel opinion plainly misplaces reliance on the fact that dancing is a "secular" activity. While this is true, it completely misses the point that the *opposition to dancing* in Purdy and the resulting decision to retain the no-dancing rule was intended to promote certain religious beliefs. In this respect, the instant case is indistinguishable from *Epperson v. Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968). Although the teaching of evolution is a "secular" activity, this Court ruled in *Epperson* that the Arkansas law prohibiting the teaching of evolution was unconstitutional because the *opposition to evolution* was based on the religious views of the electorate. *Id.* at 107-08, 21 L. Ed. 2d at 236 ("fundamentalist sectarian conviction was and is the law's reason for existence"). Similarly, the maintenance of the no-dancing rule cannot withstand constitutional scrutiny because it was motivated by a desire to promote the religious beliefs of certain board members and locally dominant religious groups.

The panel opinion also conflicts with the decisions of this Court by resting on the "facial neutrality" of the no-dancing rule without considering the underlying purposes of the School Board. Under the "sham purpose" doctrine, this Court has repeatedly held that the proper inquiry must extend beyond the "facial neutrality" of the challenged governmental action. *See Edwards v. Aguillard*, 482 U.S. 578, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 86 L. Ed. 2d 29, 105 S. Ct. 2497 (1985); *see also Lynch v. Donnelly*, 465 U.S. 668, 694, 79 L. Ed. 2d 604, 623, 104 S. Ct. 1355 (1984) (O'Connor, J.,

concurring) ("every governmental practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion"). As the trial court found, *everybody* in Purdy (including the members of the School Board) was keenly aware that the maintenance of the no-dancing rule was motivated by a desire to endorse and promote fundamentalist religious beliefs as official school policy. The "facial neutrality" of the no-dancing rule cannot overcome the fact that the no-dancing rule was inherently religious to the Purdy School Board. *See* A-11.

Nor can the absence of evidence establishing the purpose of the rule when it was enacted a century ago justify its present day maintenance and enforcement. As Justice O'Connor has pointed out, the "history and ubiquity" of a challenged practice does not provide an artificial exception to Establishment Clause scrutiny; instead, it is relevant only because "it provides *part* of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *County of Allegheny v. ACLU*, 106 L. Ed. 2d 472, 519, 109 S. Ct. 1086 (O'Connor, J., concurring) (emphasis added).

This case focused on the actions of the Purdy School Board in 1986 when it not only denied a request for a school-sponsored dance but also blocked the otherwise permissible rental of school facilities for a parent-chaperoned dance. The board's actions were directly contrary to the professional judgment of the school district superintendent, Dr. Richard Place, and the views of at

least three board members that the rule should be rescinded because school dances are an appropriate extracurricular activity for teenagers. As a matter of overwhelming proof, those secular views were ignored and the rule was retained and enforced in a conscious effort to endorse and promote the fundamentalist religious belief that social dancing is sinful. In light of this evidence, and the trial court's undisturbed credibility findings, the maintenance of the rule did not "merely coincide" with local religious beliefs; rather, the maintenance of the rule was a direct and purposeful endorsement of those religious beliefs.

It also is beyond dispute that the Purdy School Board's maintenance of the no-dancing rule was widely perceived as a powerful endorsement by the public school system of fundamentalist religious beliefs. Under these circumstances, the panel's unanalyzed conclusion that the no-dancing rule did not have the "primary effect" of advancing religion must be reexamined. As the district court noted, "[t]he public stamp of approval cannot be placed on one faith – even if it is the majority in a particular school system." A-14, A-15. Simply put, the board's actions ran afoul of the Establishment Clause which, "at the very least, prohibits government from *appearing to take* a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3101, 106 L.

Ed. 2d 472, 495 (1989) (citation omitted) (emphasis added).[2]

The inescapable fact remains that, within the Purdy community, the School Board's maintenance of the no-dancing rule is widely viewed as a symbol of official governmental endorsement for fundamentalist religious beliefs. Although there is no physical manifestation of the rule, such as a creche or a cross, the effect on the community is no less powerful. *Compare County of Allegheny v. ACLU*, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (creche display violated Establishment Clause because it conveyed message of governmental endorsement for Christianity), *with Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 86 L. Ed. 2d 557, 105 S. Ct. 2914 (1985) ("primary effect" violation where legislation conveyed message of endorsement of a particular religious belief); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 74 L. Ed. 2d 297, 103 S. Ct. 505 (1982) ("primary effect" violation where legislation created appearance of delegation of governmental power to churches). Chief Judge Lay instantly recognized this in his opinion dissenting from the denial of rehearing:

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[2] It should be noted that the Court's language in *County of Allegheny* emphasizes the prohibition against governmental action which creates an "appearance" of taking a position on religious beliefs without any corresponding secular justification. The panel's modified quotation from *County of Allegheny*, which speaks only of whether government has "take[n] a position," plainly overlooks the importance of "appearances" in "primary effect" analysis. *See* A-23. Indeed, the "appearance" of promoting religion is the very focus of this prong of the *Lemon* test. *See Lynch v. Donnelly*, 465 U.S. 668, 690, 79 L. Ed. 2d 604, 621, 104 S. Ct. 1355 (1984) (O'Connor, J., concurring).

> As a symbol of religious endorsement, the rule is no less obvious than a monument anchored to the schoolhouse lawn pronouncing: "THIS SCHOOL ADHERES TO THE BASIC TENETS OF THE MINISTERIAL ALLIANCE CHURCHES." A-36, A-37.

The panel's blunt ruling that the religious effect of the rule is "indirect, remote and incidental" directly conflicts with the factual findings of the district court and with this Court's admonition that the religious effect of a challenged governmental practice must be judged in its unique factual context. *County of Allegheny*, 106 L. Ed. 2d at 496, 109 S. Ct. at 3103; *Wallace*, 472 U.S. at 74, 86 L. Ed. 2d at 54-55 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 694, 79 L. Ed. 2d at 623 (O'Connor, J., concurring). Judge Clark, who heard the evidence over four days of trial and who lives in the strongly fundamentalist Southwest Missouri area, was fully aware of the symbolic importance of the no-dancing rule and its impact on members of minority faiths. Giving proper deference to the district court's factual findings, particularly his credibility findings, it is plainly evident that the actual purpose and primary effect of the no-dancing rule – indeed, the sole purpose and effect of the rule – is the promotion of religious dogma as official governmental policy. The panel opinion's unanalyzed conclusions to the contrary are squarely in conflict with the decisions of this Court.

B. This Case Presents a Critical Challenge to This Court's Establishment Clause Jurisprudence

If the panel opinion stands unreviewed, the precedent thereby created will carry grave constitutional

implications for the Nation as a whole. As Chief Judge Lay wrote in his dissent from the denial of rehearing:

> I dissent from the denial of the suggestion for rehearing en banc. I do so not only because the panel's decision is wrong; I do so because of the unwarranted precedent created in this circuit and throughout the nation providing a devious springboard for further destruction of the wall separating church and state. A-39.

Contrary to the Establishment Clause precedents handed down by this Court, the panel decision cavalierly disregards the "sham purpose" doctrine and refuses to consider the factual context of the challenged practice. Even more dangerous is the panel's identification of "facial neutrality" as a concept which immunizes otherwise objectionable governmental conduct. Under the panel's analysis, this Court's decisions in *Edwards*, *Wallace*, and *Epperson* would be stripped of their precedential importance.

The Establishment Clause stands as our country's most important means of preventing religious tyranny and guaranteeing individual freedom of belief. The constitutional separation of church and state is particularly important in the public school setting, a venue which this Court historically has guarded with special vigilance:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.

Edwards v. Aguillard, 482 U.S. 578, 584, 96 L. Ed. 2d 510, 519, 107 S. Ct. 2573 (1987).[3] This case challenges this Court to indicate whether it will reaffirm or retreat from the vigilance promised in *Edwards*, *Wallace*, and *Epperson*. The stakes must not be underestimated, for nothing less is involved than the freedom of thought and belief of the students and parents of the Purdy R-2 School District. As Judge John Gibson succinctly put it in his dissent from the denial of rehearing:

> This is a case about religious tyranny. . . .In the overall scheme of things, a dance at Purdy high school, with an enrollment of 519, may not be of earth-shattering significance. Yet, our Constitution protects *all* citizens, including the students at Purdy high school, from religious, as well as political, oppression by a majority. The first amendment rights of those students sound a call that this court should not ignore. A-35.

Because the panel decision conflicts with settled Establishment Clause jurisprudence and threatens the

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[3] In view of this special vigilance, it comes as no surprise that every public school case decided by this Court in the last thirty years has resulted in a ruling that the challenged governmental action violated the Establishment Clause. *See Edwards v. Aguillard*, 482 U.S. 578, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985); *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980); *Epperson v. Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963); *Engel v. Vitale*, 370 U.S. 421, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962). Significantly, the panel opinion does not mention and fails to apply this special vigilance.

foundation of the separation of church and state, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Jonathan CLAYTON, a minor by Connie CLAYTON his next friend; Steve Blakley, a minor by Tressia Blakley his next friend; David Mareth, a minor by Marilyn Mareth his next friend; Mark Flummerfelt, a minor by Carolyn Flummerfelt his next friend; Michael Beagle, a minor by James M. Beagle his next friend; George Fox, a minor by Joan Fox his next friend; Amy Dianne Wolf, a minor by Frances Ann Wolf her next friend, Anna Svetlecic, a minor by Vicki Svetlecic her next friend, Connie Clayton, Tressia Blakley, Vicki Svetlecic, Walter Welch, Sherry Welch, Robert Mareth, Marilyn Mareth, Michael Flummerfelt, Carolyn Flummerfelt, Frances Ann Wolf, Joan Fox, Howard Fox, Jr. and James M. Beagle, Plaintiffs.

v.

Richard M. PLACE, Glen Garrett, Rex Henderson, Allen Keeling, Art Negre, Jacqueline Stephens, and Jim Terry, all in their individual and official capacities, and Purdy R-II School District, Defendants.

No. 86-5184-CV-SW-4.

United States District Court,
W.D. Missouri.
Southwestern Division.

Aug. 1, 1988.

ORDER

RUSSELL G. CLARK, District Judge.

Plaintiffs, school children, parents and taxpayers of the Purdy R-II School District bring this action against the defendants, the school board and school superintendent of Purdy R-II School District alleging a violation of the First Amendment of the United States Constitution. The

plaintiffs allege that Policy Rule 502.29 of the Purdy R-II School District endorses or advances the "no dance" religious beliefs of the Purdy community and thus violates the Establishment Clause of the First Amendment. Defendants deny that Rule 502.29 has any religious significance, but rather argue that it is merely a reflection of the Purdy community's "cultural conservatism." This case was tried to the Court without a jury from June 27, 1988 through June 30, 1988.

The issue before this Court is not (as defendants contend) whether the Purdy School District must sponsor social dances, nor is it the responsibility or perogative of this Court (as plaintiffs contend) to mandate how many, if any, or when school dances are to be held. The issue is simply whether the rule which prohibits school dances in the Purdy school system is an impermissible establishment of religion. For the following reasons, the Court finds that Rule 502.29 of the Purdy R-II School District violates the United States Constitution, specifically, the Establishment Clause of the First Amendment.

Pursuant to Rule 52, Fed.R.Civ.P., the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiffs Jonathan Clayton, Michael Beagle, George Fox and Amy Diane Wolf are 1988 graduates of Purdy R-II High School.

2. Plaintiffs Steve Blakley, Mark Flummerfelt and Anna Svetlecic are currently enrolled in Purdy R-II High School.

3. Plaintiffs Connie Clayton, Tressia Blakley, Vickie Svetlecic, Walter Welch, Sherri Welch, Robert Mareth, Marlene Mareth, Michael Flummerfelt, Carolyn Flummerfelt, Francis Ann Wolf, Joan Fox, Howard Fox, Jr., and James M. Beagle are parents of children who have attended, are attending, or in the near future will attend Purdy R-II High School. Each of these plaintiffs also is a taxpayer in the Purdy R-II School District.

4. Defendant Richard M. Place is the former superintendent of the Purdy R-II School District.

5. Defendant Sheldon Buxton is the present superintendent of the Purdy R-II School District.

6. Defendants Glen Garrett, Rex Henderson, Allen Keeling, Art Negre, and Jim Terry currently are and, since at least 1985, have been members of the Board of Education of the Purdy R-II School District.

7. Defendant Launce Bunnell currently is a member of the Purdy R-II Board of Education.

8. Defendant Jacqueline Stephens was a member of the Board of Education of the Purdy R-II School District during 1986, but is not currently on the Board.

9. Each of the plaintiffs in this case are residents of the Purdy R-II School District, Barry County, Missouri, within the Southwestern Division of the United States District Court for the Western District of Missouri.

10. Defendant Purdy R-II School District is a duly constituted school district under the laws of the State of Missouri, and is located in the County of Barry, State of Missouri. Defendant School District offers education to children in grade levels kindergarten through twelve at

facilities located within the corporate limits of the City of Purdy, Missouri.

11. Each of the individual defendants were residents of Barry County, Missouri at the time of the filing of this lawsuit.

12. Defendant School District's Policy 502.29 states:

> *Secret Organizations – School Dances.* No fraternities, sororities, secret societies, or organizations shall be permitted, nor shall any student organization be permitted to elect its [sic] own membership. School dances are not authorized and school premises shall not be used for purposes of conducting a dance.

13. At the January 9, 1978 school board meeting, student council representatives and class representatives requested permission to allow school dances to be held at school. The School Board voted the request down by 4-2.

14. Board member Jim Terry voted to allow dancing. Jim Terry was defeated in the next school board election.

15. In October 1984, Purdy students Ed Mareth, Kevin Keeling and Eddie Ray contacted Superintendent Place to request permission to have a homecoming school dance. Superintendent Place, who was and is in favor of the school dances, contacted the board members to get their views.

16. Board president Garrett thought it might be time to try it, but stated that the last time the dance issue was brought up it generated a lot of heat. Board member Terry said he would favor changing the rule unless the change generated a lot of controversy. Board member Stevens was in favor of changing the rule.

17. Board member Keeling opposed changing the rule stating that he may be considered a hypocrite for allowing his children to dance, but he sincerely believed that most people did not want the rule changed. Board member Henderson's views were similar to Keeling's views. Board member Negre was also concerned about community support and possible school chaperoning. No formal request was made to the school board at that time and the board took no action.

18. During the 1985-86 school year, another group of students and parents sought to change Rule 502.29. At a January meeting with Superintendent Place, when questioned by the parents about the reasons for the prohibition, Superintendent Place stated words to the effect "why should this surprise you, this is a conservative, religious community." When asked if it were the Baptists that opposed dancing, Superintendent Place stated, "Let's just say protestants."

19. Prior to the February meeting, Board member Keeling told Caroline Plummerfelt that he opposed changing the rule because his church preached that it was wrong and immoral to dance.

20. At the February 10, 1986 school board meeting, plaintiffs Connie Clayton, Tressia Blakley, Marlene Mareth, Carolyn Flummerfelt, James Beagle, Joan Fox, Robert Mareth and Michael Flummerfelt appeared to request a reconsideration of Rule 502.29 in order to sponsor dance by the newly formed SADD (Students Against Drunk Driving) chapter. At the meeting the school board members discussed all of the telephone calls they had been receiving concerning the dance issue. The board members

now state the callers gave no reasons for maintaining the rule. Reverend Ted Davis and his wife were present at the meeting to state their opposition to a change in the rule. When Reverend Davis was asked for his reasons, board president Garrett stated that he did not have to tell anyone his reasons. Garrett stated "you'd better hope there's never separation of God and school" in response to a question about the separation of church and state. Rev. Davis then asked for time to respond to the rule change at the next school board meeting.

21. When school board member Terry was contacted by plaintiff Fox, he stated that he had voted for dance in the past but caught so much "flak" from the ministers that he would vote against it this time. School board member Keeling stated to Fox that he did not believe in dancing because he was taught it was wrong.

22. Board member Keeling told plaintiff Marlene Mareth that his background disfavored dancing; board member Negre stated his church is opposed to dancing.

23. After the February meeting the Ministerial Alliance met to plan the opposition to changing the rule. The group consists of ministers from the First Baptist, the First Christian, the First Free Will Baptist, the First Assembly of God, and the Macedonia Baptist Churches. There are no Catholic, Lutheran, Presbyterian, Methodist, Jewish or Mormon members in the Ministerial Alliance. The members agreed to "get" their church members to attend the March school board meeting to oppose a change in the rule.

24. The First Baptist Church minister, Rev. Winfrey, spoke to his congregation about the upcoming dance

issue at the school board. He encouraged the congregation to attend the meeting and oppose the change in the rule to allow dancing. The church congregation has prayed for member Blakley's soul for trying to change the rule in the school.

25. To become a member of the First Assembly of God, a person must agree to be separate from worldliness – which includes dancing. The minister of that congregation, Rev. Dement testified that if a member of his congregation engaged in social dancing he would have no choice but to refer him/her to the Presbyters for counseling. He encouraged his congregation to attend the March meeting and made known his views against dancing.

26. Prior to the March meeting, the minister of the Free Will Baptist Church, Ted Davis, contacted every school board member except Stephens to voice his opposition to school dancing. Davis informed his church that there was a petition to be signed concerning dancing as they left the service the Sunday before the March meeting; he believes and preaches that social dancing is sinful, scripturally prohibited, and possibly satanic. He has discussed this view with church members, has preached against dancing from the pulpit and would have a private counseling session with a member of his congregation who engaged in social dancing.

27. The topic at Sunday school on the Sunday before the Board meeting at the Macedonia Free Will Baptist Church, was the change in the rule. Board member Henderson was present and stated that there would be no dancing as long as he was on the school board and encouraged everyone to go to the meeting to show their

opposition to any change in the rule. Later at the church service, Gary Pinnell rose and asked everyone to show their support for the rule. Rev. Neal, a member of the Ministerial Alliance, believes social dancing is inappropriate behavior, has discussed his beliefs with board members Henderson and Negre, and has "mentioned" his belief in church services.

28. The largest crowd ever attended the March 19, 1986 board meeting. At the meeting on the dance issue, a presentation was made by Joan Fox, Rev. Davis and Gary Pinnell. No direct mention was made of religion per se at the meeting; however, the letter from the Ministerial Alliance was read in its entirety. At the end of Rev. Davis' talk, he asked the 250-400 people in attendance to stand in opposition to changing the rule. The overwhelming majority of people stood in opposition to changing the rule. Later in closed session, the Board did not take a formal vote, but left the rule intact.

29. Prior to April 1986, the school premises were rented for various nonschool functions except on Wednesday and Sunday evenings. Wednesday and Sunday are traditional church nights. On April 18, 1986, plaintiff Carolyn Flummerfelt completed an application for the rental of the Purdy Elementary School for an end of the year dance. Superintendent Place referred the request to the school board. The board called a meeting on April 29, 1986 and with counsel present went into executive closed session. The board suspended their rental policy at that meeting. At a later meeting the board decided not to rent to any outside group – that the school buildings would be used for school purposes only. Since that time, the building and grounds have been used for

nonschool softball leagues, pick-up basketball games and an exhibition donkey basketball game.

30. In the past twelve years a "banquet" has been held for juniors and seniors with teachers and chaperones. The place of the banquet has varied, but has often been held on school property. The "prom" is then held off the school grounds (often in neighboring towns) without teacher participation or school funding. A breakfast is often held around 1:00 or 2:00 a.m. at the school. If the "banquet" is held off-campus, teachers chaperone off-campus; the banquet has been held several times in Springfield, which is approximately 60 miles from Purdy.

CONCLUSIONS OF LAW

Initially, the Court notes the allegation by defendants that the claims of the Purdy R-II High School graduates are moot is without merit. Those students have a claim for nominal damages, attorney's fees and costs which may proceed. Defendants' motion to dismiss Jonathan Clayton, Michael Beagle, George Fox, and Amy Dianne Wolf will be denied. Defendants' motion for partial summary judgment (on Counts II and III) will be denied. It is not necessary to rule on the summary judgment motion in view of the finding in plaintiff's favor on Count I. The Court finds that Robert Mareth, Marlene Mareth and James Beagle do have citizen standing to challenge an establishment clause claim. Furthermore, whether any particular plaintiff has standing does not affect the outcome of this decision.

The Supreme Court has consistently used a three-part test in analyzing whether there is a violation of the establishment clause of the First Amendment to the United States Constitution. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, and third the statute must not foster excessive governmental entanglement with religion. *Id.* at 612-13, 91 S.Ct. at 2111. Excessive entanglement has been further defined as either excessive administrative entanglement or excessive political divisiveness. *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 1365, 79 L.Ed.2d 604 (1984). The Supreme Court has not held excessive political divisiveness alone to invalidate otherwise permissible conduct. *Id.*

Lemon's purpose requirement aims at preventing the relevant governmental decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, ___ U.S. ___, 107 S.Ct. 2862, 2868, 97 L.Ed.2d 273 (1987). Defendants argue that dancing in this case is not a religious issue. That assertion has no basis in the evidence presented to this Court.

The Court regards the following statements of the board members as unpersuasive; that no one has ever stated to them that they oppose dancing in the schools for religious reasons; that they have no idea why the community is opposed to dancing in the school; that there was no religious pressure to keep the rule; and that the rental policy was changed in response to problems with liability

of the schools. Particularly incredible are board member Henderson's courtroom statements that his vote did not reflect his personal religious feeling nor religious beliefs of the community and his statement that there was no religious significance to the entire hour discussion at Sunday school on the dance issue prior to the March meeting. Likewise, board member Terry's denial of any pressure for church members or ministers and his courtroom statements about no church influence is not believable in view of the contradictory testimony of the subpoenaed Sell, plaintiffs Flummerfelt and Fox, and defendant Place. Board member Negre's denial of ever hearing religious reasons espoused for not changing the rule is contradicted by his own minister's statement. While it is true that a secular approach may coincide with an approach taken by certain religions and not be inherently religious, the Court finds that the rule prohibiting dancing is inherently religious to the Purdy R-II School Board.

The entire board candidly admits that they followed the will of the majority; but they were not candid in their opinions on the religious reasoning of the majority . The board members were not particularly credible, either in demeanor or in the substance of their testimony. As stated above, it is inconceivable that no one in the Purdy area has ever expressed the view, within the board members' hearing, that dancing is either immoral, sinful or against any religion. It is inconceivable that certain board members were totally unaware that dancing was against the tenets of some Purdy residents' religion. It is equally unbelievable that the board placed no religious significance to a statement given by the ministerial alliance, a

group of ministers whose combined ministry included some of the board members. This Court is skeptical that it heard the complete story concerning the board members' deliberations of the rule and the religious significance of the opposition to dancing in Purdy. The school board adopted the reasoning of the "majority" of townspeople, including the strongly-held religious views.

Furthermore, the board's courtroom statements that they accepted the minister's statements at face value defy reality. It is unbelievable that 300-400 people came to the school board meeting to protest the added expense of 1 or 2 dances or the increased responsibility to teachers. The teachers already must chaperone the banquet but leave when the dancing begins. It is particularly significant that no facts were requested of the opponents of the rule to ascertain whether there would be any increased costs or responsibilities. The record is devoid of any indication that the board investigated the reasons propounded by the opponents, despite the fact that the school's superintendent favored rescinding the rule and stated that he could handle any chaperoning problems.

Condemnation of dancing is not firmly rooted in Judeo-Christian moral or ethical standards. Allowing students to engage in dancing within the school building does not conflict with our historical traditions. See, *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983); *Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir.1980), *cert. denied* 449 U.S. 987, 101 S.Ct. 409, 66 L.Ed.2d 251 (1981). Although the intent of the decisionmakers who promulgated the rule cannot be ascertained, the school board in

keeping the rule abandoned neutrality with the intent to promote a particular view in religious matters.

Particularly significant to this Court is the fact that in April a group of parents wanted to rent the school facilities for a school dance. There would be no added cost to the school, no supervision by teachers and no classroom time attributed to extracurricular activities. Yet the school board called an emergency meeting to do away with the entire rental policy rather than allow dancing in the school. It is one thing to be opposed to the school itself sponsoring and paying for an extracurricular activity and quite another to prohibit social dancing on school property. It is clear to the Court that the reasons propounded by the majority were a mere pretext for the real religious reasoning. Thus, there is no valid secular purpose to having Rule 502.29.

Even if the defendants could show a valid secular purpose, the primary effect of this rule is to endorse the tenets of that particular religious group in Purdy who believe that social dancing is sinful. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 104 S.Ct. at 1367 (O'Connor J., concurring). "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community." *Lynch* at 1369 (O'Connor, J., concurring). In the present matter, the school board is

placing the state's imprimatur on one particular religious belief. The testimony at trial was that a tenet of the Purdy Assembly of God religion is a separation from worldliness, including dancing. The evidence was that a tenet of the Purdy Free Will Baptist Church is that social dancing is sinful by prohibiting dancing in the Purdy School, the school board has assumed the role of monitoring adherence to that particular tenet. The religion of every man must be left to his convictions and conscience and it is the right of every man to exercise his religion as his convictions and conscience may dictate. *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 2488 n.38, 86 L.Ed.2d 29 (1985). Church members or non-church members can no longer follow their own convictions and conscience; this religious decision has been made for them.

The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children of formative years. *School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985). That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. *Wallace*, 105 S.Ct. at 2492 n. 51 [quoting *Illinois, ex rel. McCollum v. Bd. of Education*, 333 U.S. 203, 227, 68 S.Ct. 461, 473, 92 L.Ed. 649 (1948) (Frankfurter, J., concurring)]. The right to dance may not be a tenet of the Methodist, Catholic, Lutheran or Mormon Church, but the children of these faiths cannot be made to feel that their religions are inferior because their churches do not prohibit (and in some cases, actually sponsor) dances. The public stamp of approval cannot be placed

on one faith – even if it is the majority in that particular school system. It is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment (citations omitted). *Stone v. Graham*, 449 U.S. 39, 42, 101 S.Ct. 192, 194, 66 L.Ed.2d 199 (1980). The administration of religious training is properly in the domain of the family and church. *Florey, supra* at 1318. The First Amendment prohibits public schools from serving that function. The primary effect of Rule 502.29 is to advance the religious beliefs of a particular religion.

The third prong set out in *Lynch* is whether there is excessive administrative or political entanglement. There is no question that the dance issue is deeply divisive in the Purdy area, nor is there any question that it has been a divisive issue for many years. The elaborate steps the school system took to ensure that dancing would not occur included having a junior/senior banquet at the school with teacher chaperones, adjourning to separate facilities for dancers and non-dancers, and then a parent-sponsored breakfast at 1:00 or 2:00 a.m. Special steps were taken so that banquet decorations would not be used as dance decorations. Money raised by having a dance could not be used by the Purdy High School classes for the class trip. The excessive caution surrounding anything connected with dancing undermines any assertion of a secular purpose, but it also suggests the extreme divisiveness of this issue. Religious groups of course have an absolute right to make their views known and to participate in public discussion of issues. The ministers who participated in this public debate can in no way be criticized by the state for that participation; however, those views may not prevail if they conflict with the

constitutional mandate forbidding the establishment of a religion. Rule 502.29 of the Purdy R-II School District violates the Establishment Clause of the First Amendment to the Untied States Constitution because the prohibition against dancing in a public school has no secular purpose, advances the tenets of one group of religion, and is politically divisive.

It would be inappropriate for this Court to order the district to sponsor school dances; however, a district rule prohibiting students from holding dances on school property infringes on the First Amendment rights of the students and must be invalidated. Accordingly, it is

ORDERED that School Board Policy Rule 502.29 of the Purdy R-II School District is unconstitutional; and it is further

ORDERED that the School Board is enjoined from enforcing Rule 502.29; and it is further

ORDERED that plaintiffs are awarded nominal damages in the amount of $1.00 to each of them plus reasonable attorney's fees; and it is further

ORDERED that the Clerk shall refrain from entering final judgment until a hearing can be held on attorney's fees; and it is further

ORDERED that a hearing on the attorney's fees issue is set for Friday, September 2, 1988 at 9:00 a.m.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2493

Jonathan Clayton, a minor, by Connie Clayton, his next friend; Steve Blakley, a minor, by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor, by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James M. Beagle, his next friend; George Fox, a minor, by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley; Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,	*	Appeal from the United States District Court for the Western District of Missouri.
Appellees,	*	
v.	*	

Richard M. Place; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; All in their individual and official capacities and Purdy R-2 School District,

Appellants.

Submitted: April 10, 1989
Filed: September 1, 1989

Before FAGG, Circuit Judge, FLOYD R. GIBSON, and TIMBERS,* Senior Circuit Judges.

FAGG, Circuit Judge.

Rule 502.29 of the Purdy R-2 School District provides in part: "School dances are not authorized[,] and school premises shall not be used for purposes of conducting a dance." Although the record does not indicate when the rule was enacted, the parties agree it has been in place for a long time. A group of students, parents, and taxpayers (collectively plaintiffs) brought this action against the Purdy R-2 School District, its Superintendent, and members of the District's Board of Education (collectively the District), seeking to set aside the no-dancing rule. Among other theories, plaintiffs asserted the rule violates the establishment clause of the first amendment because it

*The HONORABLE WILLIAM H. TIMBERS, Senior United States Circuit Judge for the United States Court of Appeals for the Second Circuit, sitting by designation.

advances the views of residents in the Purdy District who oppose dancing on religious grounds. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The district court agreed and invalidated the rule on that basis. *See Clayton v. Place*, 690 F. Supp. 850, 854-57 (W.D. Mo. 1988). The District now appeals, and we reverse.

Purdy is a small, primarily rural community in southwestern Missouri. The record indicates religion is an important force in Purdy, and particular churches are staunchly opposed to social dancing. A tenet of one denomination in Purdy specifically requires "a separation from worldliness, including dancing," *id.* at 856, and another teaches "social dancing is sinful," *id.* Over the years, various groups have unsuccessfully sought permission for school dances and have proposed changing the District's no-dancing rule. Despite their lack of success, however, Purdy students are not prohibited from holding dances away from school property, and they have regularly done so.

In February 1988, a group seeking reconsideration of rule 502.29 to enable a newly formed student organization to sponsor a dance at the high school appeared before the Board of Education (the Board). A local minister who opposed changing the rule attended the meeting and requested a place on the Board's March agenda to make a presentation on the subject. Following discussion, the Board deferred action on the issue until the March meeting.

In the interim, it is fair to say the Purdy religious community actively discussed the dancing issue. A group

of local ministers met to plan how to express their support for the rule. Ministers of several local churches, including some to which Board members belong, spoke out during church services against changing the rule and encouraged members of their congregations to attend the March Board meeting and show their opposition as well.

A large crowd gathered for the March Board meeting. Although "[n]o direct mention was made of religion per se at the meeting," *id.* at 853, the minister who had attended the February meeting spoke against changing the rule and read a letter from the ministerial group to the same effect. When the minister finished his presentation, he took the opportunity to ask those in the audience who opposed changing the no-dancing rule to stand. Of the estimated 250-400 people in attendance, an "overwhelming majority of people stood in opposition to changing the rule." *Id.*

The Board later went into closed session to discuss the students' reconsideration request. Although no formal vote was taken, the Board agreed unanimously to "le[ave] the rule intact." *Id.* Plaintiffs then brought this action, contending the rule violated: (1) the freedom of association clause of the first amendment; (2) the freedom of speech clause of the first amendment; (3) the establishment clause of the first amendment; and (4) article I, section 7 of the Missouri Constitution. The court rejected plaintiffs' freedom of association and speech challenges, but held that the rule violated the establishment clause of the federal constitution. In addition, the court held that for the same factual reasons given in connection with its establishment clause ruling, the District's no-dancing rule violated the Missouri Constitution. *See Clayton v. Place,*

No. 86-5184-CV-SW-4, slip op. at 1-2 (Aug. 30, 1988) (unpublished order); 690 F. Supp. at 851, 856. On appeal, the District challenges only the court's rulings pertaining to the establishment clause and to the Missouri Constitution.

In considering the district court's ruling that the Purdy no-dancing rule is invalid under *Lemon*, we review the court's findings of fact under the clearly erroneous standard. *See Carter v. Broadlawns Medical Center*, 857 F.2d 448, 453 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1569 (1989). The ultimate conclusion of the rule's constitutionality, however, is a mixed question of law and fact. *See id.* Although the record contains no indication of when or for what express purpose the rule was originally passed, that circumstance is no barrier to evaluating the rule's compliance with the establishment clause. *See Mueller v. Allen*, 463 U.S. 388, 395 n.4 (1983). The district court's opinion does not rest on any adverse factual findings bearing directly on the content of rule 502.29 or on the circumstances surrounding its original passage. Nevertheless, the plaintiffs have framed their action as one to set aside the rule, and we thus turn to examine the rule itself.

The Supreme Court has consistently followed the three-part *Lemon* test for determining whether a challenged governmental rule offends the establishment clause, and the parties agree the *Lemon* analysis applies in this case. Under the *Lemon* framework, a rule is permissible if it has a secular purpose; if it neither advances nor inhibits religion in its principal or primary effect; and if it does not foster an excessive entanglement with religion. *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3100 (1989). The challenged rule is valid only of it meets all three

tests. *See Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). The district court determined the Purdy no-dancing rule violated each of these three requirements and was thus invalid. We disagree as to each.

First, plaintiffs conceded at oral argument (and the district court acknowledged) that extracurricular dancing is a wholly secular activity. *See* 690 F. Supp. at 855 ("Condemnation of dancing is not firmly rooted in Judeo-Christian moral or ethical standards."). Further, the rule carries within its text absolutely no religious component, and there is no record evidence of any actual religious purpose connected with the rule's enactment or its textual requirements. *Compare Wallace v. Jaffree*, 472 U.S. 38, 56-57 (1985). In our view, the rule on its face thus satisfies the first prong of the *Lemon* analysis. *See Bowen v. Kendrick*, 108 S. Ct. 2562, 2570-71 (1988); *Mueller*, 463 U.S. at 394-95; *see also Florey v. Sioux Falls School Dist.*, 619 F.2d 1311, 1314-15 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

Second, the record does not fairly demonstrate that any religious doctrine is principally or primarily advanced by the Board's enforcement of the no-dancing rule. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (*Amos*). No student is prohibited from engaging in or refraining from extracurricular dancing should they choose to do so. Any arguably religious effect of the rule is indirect, remote, and incidental. *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984); *see also Bowen*, 108 S. Ct. at 2573. To the extent plaintiffs contend the rule impermissibly endorses or conveys a message of governmental preference for a particular religious viewpoint concerning social dancing, *see County of Allegheny*, 109 S. Ct. at 3101;

Bowen, 108 S. Ct. at 1571, we find nothing in the rule to suggest the District has "take[n] a position on questions of religious belief or * * * 'ma[de] adherence to a religion relevant in any way to a person's standing in the political community.' " *County of Allegheny*, 109 S. Ct. at 3101 (quoted citation omitted).

Finally, there is no showing the rule fosters excessive government entanglement in religious affairs. If anything, the rule promotes less, rather than more, school involvement in what plaintiffs contend is a religiously significant activity. *See Amos*, 483 U.S. at 339. The district court based this portion of its decision on the conclusion that the dancing debate was deeply divisive in the Purdy community. *See* 690 F. Supp. at 856. Political divisiveness along religious lines, however, is not a proper consideration except in cases involving financial aid to parochial schools. *See Bowen*, 108 S. Ct. at 2578 & n.14; *Mueller*, 463 U.S. at 403 n.11; *Carter*, 857 F.2d at 456; *Florey*, 619 F.2d at 1318. For these reasons, we conclude the District's no-dancing rule on its face satisfies the controlling *Lemon* standards. We turn now to the core of plaintiffs' additional argument challenging the rule.

Plaintiffs contend Board members acted in accordance with the religious beliefs of a majority of patrons attending the March Board meeting and in conformity with their own faiths when they acted to retain the no-dancing rule. Based on this premise, plaintiffs argue the Board's action was religiously motivated and, consequently, should result in nullification of the rule as a violation of the establishment clause. We reject this argument.

Although the record does not indicate the religious affiliation of patrons who stood in support of the rule at the March meeting, the district court held the Board had "adopted the reasoning of the 'majority' of townspeople, including the[ir] strongly-held religious views," 690 F. Supp. at 855. The court then determined "the rule prohibiting dancing [was] inherently religious to the [Board]," and "there [was] no valid secular purpose to having [r]ule 502.29," *id.* For this reason, the court concluded the Board's action violated *Lemon*'s purpose requirement because the Board "in keeping the rule abandoned neutrality with the intent to promote a particular view in religious matters," *Id.* Utilizing what amounts to the same rationale, the district court also held the rule ran afoul of *Lemon*'s effect standard because it has "the primary effect of * * * endors[ing] the tenets of that particular religious group in Purdy who believe[s] that social dancing is sinful," *id.*; *see also id.* at 855-56.

Initially, we observe the district court found a number of the Board members had at some time expressed the view that their individual religious backgrounds favored the rule. *See id.* at 852-53. In addition, the court found that to the extent Board members testified moral, educational, or fiscal concerns, and not religion, influenced their decisions, their testimony was not credible. *See id.* at 854-55. While we have no occasion to disagree with these findings, we believe plaintiffs' and the district court's reliance on them in this case is misplaced.

We readily acknowledge that under the record in this case, the no-dancing rule may be characterized as compatible with the sincerely held religious beliefs of a vocal

segment of the Purdy community. The mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group, however, does not transform the action into an impermissible establishment of religion. *See Bowen*, 108 S. Ct. at 2571 n.8; *Lynch*, 465 U.S. at 682; *Harris v. McRae*, 448 U.S 297, 319-20 (1980); *see also Webster v. Reproductive Health Servs.*, 109 S.Ct. 3040, 3082 (1989) (Stevens, J., concurring and dissenting).

We also find no support for the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action. *Cf. Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("It is unrealistic * * * to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process."). To make government action assailable solely on the grounds plaintiffs suggest would destabilize governmental action that is otherwise neutral. Indeed, the focus of *Lemon* is to avoid a haphazard approach "for determining whether a government practice violates the [e]stablishment [c]lause." *County of Allegheny*, 109 S. Ct. at 3100.

We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards. In addition to its unrealistic nature, this approach to constitutional analysis would have the effect of disenfranchising religious

groups when they succeed in influencing secular decisions. In this case, the district court recognized "[r]eligious groups * * * have an absolute right to make their views known and to participate in public discussion of issues," 690 F. Supp. at 856. Nevertheless, the court held "those views may not prevail," *id.*, even though these groups have long been legitimate participants in secular community debate, *see Bowen*, 108 S Ct. at 2573.

At bottom, the proper remedy for plaintiffs' disenchantment with a Board that refused to change a rule that is compatible with *Lemon* is found at the ballot box and not in the Constitution. Having carefully studied the applicable authorities, the record, and the parties' arguments, we hold the District's no-dancing rule is not an unconstitutional establishment of religion under the first amendment.

We now turn to plaintiffs' argument that the rule violates article I, section 7 of the Missouri Constitution. The district court treated the relevant state constitutional provision as coextensive with the federal establishment clause for purposes of plaintiffs' action, and we adopt that construction as well. *See Goodwin v. Circuit Court*, 741 F.2d 1087, 1089 (8th Cir.), *cert. denied*, 469 U.S. 1216 (1984) ("We normally defer to the district courts on questions of the law of their own states, and this principle applies to state constitutions * * *."). In view of our decision on the federal constitutional principles, we necessarily conclude the District's rule does not infringe the state constitutional section challenged here. Accordingly, we reverse the district court's ruling on this issue.

In sum, we reverse the district court's challenged rulings and remand the case for proceedings consistent with this opinion, including reconsideration of the court's order awarding attorneys fees and expenses.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2493

Jonathan Clayton, a minor, by Connie Clayton, his next friend; Steve Blakley, a minor, by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor, by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James M. Beagle, his next friend; George Fox, a minor, by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend; Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley; Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,

Appellees,

v.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

Richard M. Place; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; All in their individual and official capacities and Purdy R-2 School District,	* * * * * * * * * *
Appellants.	*

Filed: November 17, 1989

Before LAY, Chief Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges.

The suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc. Chief Judge Lay, Judges McMillian, Arnold and John R. Gibson dissent from the denial of the suggestion for rehearing en banc.

The petition for rehearing is also denied.

JOHN R. GIBSON, Circuit Judge, with whom LAY, Chief Judge, McMILLIAN and ARNOLD, Circuit Judges, join, dissenting.

I respectfully dissent from the decision of a bare majority of this court to deny rehearing en banc in this case. The district court's findings of fact, *Clayton v. Place*, 690 F. Supp. 850, 851-56 (W.D. Mo. 1988), demonstrate overwhelmingly that the religious views of five churches in Purdy, Missouri, caused the school board to refuse to

change its rule prohibiting social dancing.[1] These findings compel the conclusion that the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has not been satisfied.

The opinion of the panel, *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989), properly recognizes that the district court's findings of fact are reviewed under the clearly erroneous standard, but the ultimate question of the rule's constitutionality is a mixed one of law and fact. There is no claim that any finding of fact is clearly erroneous.

It is true, as the panel opinion states, that the rule is facially secular; the text of the rule does not explicitly state that dancing is prohibited for religious reasons. While the origins of the rule are not described, the issues before us deal with the enforcement of the rule and the board's refusal to change it. The *Lemon* test cannot be circumvented by merely omitting from a rule any explicit statement of religious purpose. Rather, the first part of the *Lemon* test depends upon the government's "actual purpose" in making a decision. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). Moreover, while courts are "normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Id.* at 586-87. In this case, as in *Aguillard*, the board has "identified no clear secular purpose" for continuing to enforce its rule. *Id.* at 585.[2] In

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[1] The Purdy School District's Policy 502.29 states: "School dances are not authorized and school premises shall not be used for purposes of conducting a dance."

[2] The panel opinion states that the extracurricular dancing in this case is wholly secular. The true issue in the case, however, is whether the "no dance" rule has a secular purpose.

contrast, the findings of the district court make abundantly clear that adherence to the rule does have a clear religious purpose. *Cf. id.* at 587-93 (examining the legislative history of an act to determine whether it was motivated by a religious purpose); *id.* at 597-602 (Powell, J., and O'Connor, J., concurring) (same); *Wallace v. Jaffree*, 472 U.S. 38, 56-57 (1985) (same). The panel's conclusions in applying the *Lemon* test fail to give proper consideration to the findings of the district court, which must be set out in some detail.

During 1985-86, the parents and students involved in this litigation sought to change the "no dance" policy. The parents first asked Richard Place, the Superintendent of Schools, why dances were prohibited. Place answered that it was because Purdy was a conservative, religious community. They then asked if the rule was in effect because the Baptists opposed dancing, and Place answered, "Let's just say protestants." Prior to the school board meeting at which the proposal to permit dances was discussed, board member Keeling stated that he opposed changing the rule because his church preached that it was wrong and immoral to dance. Board member Terry told one of the plaintiffs that he had voted to permit dances in the past but caught so much "flak" from the ministers that he would vote against it this time. Board member Negre also declared that his church was opposed to dancing. At the February 10, 1986, meeting when the request to permit dances was initially made, Reverend Davis of the Free Will Baptist Church and his wife were present to state their opposition to a change in the rule. After Reverend Davis spoke, someone asked board president Garrett about the separation of church

and state. Garrett responded that, "you'd better hope there's never separation of God and school." *Clayton*, 690 F. Supp. at 852.

After the meeting, the Ministerial Alliance, composed of ministers from the First Baptist, the First Assembly of God, the First Free Will Baptist, the Macedonia Free Will Baptist, and the First Christian Churches,[3] met to plan the opposition to changing the rule. The ministers agreed to persuade their members to attend the March meeting to fight the proposed change in the rule.

The minister of the First Baptist Church spoke to his congregation about the dance issue, and encouraged them to attend the meeting and fight the proposed change. In addition, his congregation prayed for board member Blakely's soul because he tried to change the rule. *Id.* at 853.

The minister of the First Assembly of God Church testified that he would refer any member of his congregation who engaged in dancing to the Presbyters of the church for counseling. He also encouraged the congregation to attend the March meeting and reminded them of the church's position on dancing. To become a member of the First Assembly of God Church, a person must agree to be separate from worldliness, which includes dancing.

The minister of the Free Will Baptist Church believes and preaches that dancing is sinful, prohibited by scripture, and possibly satanic. He has preached against dancing from the pulpit and has had a private counseling

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[3] The district court noted that there were no Catholic, Lutheran, Presbyterian, Methodist, Jewish or Mormon members in the Ministerial Alliance. *Clayton*, 690 F. Supp. at 853.

session with any member of his congregation who engaged in dancing. Before the board met to consider the proposed change, he contacted all but one of the members to voice his opposition to school dancing. He also informed his church members that there would be a petition for them to sign to indicate their opposition to the proposed change.

The Sunday before the board meeting, the congregation of Macedonia Free Will Baptist Church discussed the rule and board member Henderson was present at the discussion. Henderson promised that there would be no dancing at the schools as long as he was on the school board, and he encouraged everyone to go to the meeting to show their opposition to any change in the rule. The minister of the church, who has said during church services that he believes dancing is inappropriate behavior, also discussed his beliefs with board members Henderson and Negre.

There were 250 to 400 people in attendance at the March 10, 1986 board meeting. When the ban on dances was discussed, no direct mention of religion was made, but a letter from the Ministerial Alliance was read in its entirety. Reverend Davis of the Free Will Baptist Church argued that the "no dance" rule should not be changed. As he concluded, he asked the people in the crowd to signify their opposition to changing the rule by standing. The overwhelming majority of people stood in opposition to the proposed change in the rule. The board later held a closed session. While the board did not take a formal vote, it left the rule intact.

On April 18, 1986, one of the parents requested permission to rent the elementary school building for a school dance. Prior to that date, the school premises had been rented for various nonschool functions. At the April 29th meeting, however, the board voted in favor of suspending its rental policy.[4]

The district court, in applying the Lemon test to these facts,[5] found unpersuasive the testimony of the board members that they had opposed dancing in the schools for secular reasons, that there was no religious pressure to keep the rule, and that the rental policy was changed in response to problems with the liability of the school.[6] The district court then found that the rule prohibiting dancing was "inherently religious to the [Purdy] School Board." *Clayton*, 690 F. Supp. at 855. It singled out the elimination of the rental policy and found that the board's purported reasons for the action were a mere pretext for the real religious justification.

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[4] At a later meeting, the board adopted a policy of not renting to any outside group and not using school buildings for other than school purposes. Since that time, however, the building and grounds have been used for nonschool softball leagues, pick-up basketball games, and an exhibition donkey basketball game.

[5] The district court's conclusions of law discuss not only legal issues but also contain an assessment of the credibility of board members' statements which are, I think, findings of fact, and they will be treated as such. *Clayton*, 690 F. Supp. at 854-55.

[6] The record does not reveal why dancing poses greater liability problems than does donkey basketball. *See supra* note 4.

The findings of the district court, eloquent in their simplicity, compel its conclusion, and support mine, that the school board was motivated by religious purposes. Strictly speaking, this conclusion renders unnecessary a consideration of the second and third components of the *Lemon* test. *Aguillard*, 482 U.S. at 585; *Wallace*, 472 U.S. at 56. These findings, however, also convincingly demonstrate that the principal, or primary, effect of the board's actions was to advance the religious views of some members of the community, and that the retention and enforcement of the rule constituted excessive government entanglement with these religious views. Therefore, I conclude that the second and third components of the *Lemon* test are also not satisfied.

This is a case about religious tyranny. The members of five churches who have strong views on the religious significance of dancing successfully exerted pressure on the board to prohibit school dances. In the overall scheme of things, a dance at Purdy high school, with an enrollment of 519,[7] may not be of earth-shattering significance. Yet, our Constitution protects *all* citizens, including the students at Purdy high school, from religious, as well as political, oppression by a majority. The first amendment rights of those students sound a call that this court should not ignore. Our denial of the petition for rehearing en banc turns a deaf ear to the pleas of those students.

LAY, Chief Judge, with whom McMILLIAN and ARNOLD, Circuit Judges, join, dissenting.

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[7] *137th Report of the Public Schools of Missouri* 103 (1986).

Judge John R. Gibson's illuminating dissent should leave little doubt that the record demonstrates the Purdy school board's action focuses upon religion. The trial court's findings should be upheld under the clearly erroneous rule. I write separately to underscore my disagreement with the panel decision, and to elaborate on the no-dancing rule's failure to pass scrutiny under the "effects" component of the framework enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The second prong of the *Lemon* test considers whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices." *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3103 (1989) (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)). "[T]he prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.' " 109 S. Ct. at 3101 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment)) (emphasis in original).

The question, therefore, is "what viewers may fairly understand to be the purpose" of the no-dancing rule. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). To the residents of Purdy – especially the students of Purdy R-II High School – the rule's message is unmistakably clear: the school district promotes the tenets of the local religious community. As a symbol of religious endorsement, the rule is no less obvious than a

monument anchored to the schoolhouse lawn pronouncing: "THIS SCHOOL ADHERES TO THE BASIC TENETS OF THE MINISTERIAL ALLIANCE CHURCHES."

The message is not diluted, as the panel opinion suggests, by the fact that the school does not coerce students into refraining from dance away from school grounds. The Supreme Court has clearly held that proof of coercion is not a necessary element of any claim under the Establishment Clause. *County of Allegheny*, 109 S. Ct. at 3103 n.47; *Committee for Pub. Educ. v. Nyguist*, 413 U.S. 756, 2786 (1973). Indeed, the Court's recent decisions invalidating government action on Establishment Clause grounds have involved no direct coercion. *See, e.g., County of Allegheny*, 109 S. Ct. at 3086 (nativity display); *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989) (sales tax exemption for religious periodicals); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (rule limiting teaching evolution in school); *Ball*, 473 U.S. at 373 (state-sponsored educational programs at nonpublic schools); *Wallace*, 472 U.S. at 38 (moment of silence); *Stone v. Granam*, 449 U.S. 39 (1980) (posting Ten Commandments on classroom walls); *Nyguist*, 413 U.S. at 756 (tuition reimbursement to parochial school parents). It is enough that the government clearly endorses religion or particular religious beliefs, for endorsement itself "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); *see also County of Allegheny*, 109 S. Ct. at 3101. This message is particularly potent in the educational context. "The government's activities in this area can

have a magnified impact on impressionable young minds,* * *." *Ball*, 473 U.S. at 383; *see also Clayton v. Place*, 690 F.Supp. 850, 856 (W.D. Mo. 1988).

Perhaps the no-dancing rule's symbolic effect would be less potent if the rule could be explained, at least in part, by some plausible secular purpose. Although it is clear that identification of a secular purpose will not immunize governmental action from scrutiny under *Lemon's* effects test, *see, e.g., Nyguist*, 413 U.S. at 774, it might at least help mask the appearance that the action is crafted as a religious endorsement. If, for instance, the District maintained the no-dancing rule in order to avoid such problems as noise, building destruction, or shortage of supervisory personnel, the community members and students might well see it in a somewhat different light. Yet, as Judge Gibson aptly points out, no nonreligious purpose can be discerned here.

In Purdy, Missouri, the no-dancing rule differs little from a school's posting of the Ten Commandments on its classroom walls. *See Stone*, 449 U.S. at 39. In both cases the school makes it abundantly clear to the students that it embraces the tenets of a particular religion. The panel implies that a difference lies in the fact the Ten Commandments are religious on their face whereas the no-dancing rule is facially nonreligious. *See Clayton v. Place*, 884 F.2d 376, 379 (8th Cir. 1989). This distinction, however, fails to give due regard to the religious environment that provides the no-dancing rule its lifeblood: a small town in which five churches wielding political influence teach that social dancing is sinful. Only in this context can the effect of the rule be judged. *See, e.g., County of Allegheny*, 109 S. Ct. at 3103.

If the Establishment Clause carries any significant meaning, it is that government cannot maintain a practice that has as its sole purpose and primary effect the advancement of a tenet unique to particular religious groups. I dissent from the denial of the suggestion for rehearing en banc. I do so not only because the panel's decision is wrong; I do so because of the unwarranted precedent created in this circuit and throughout the nation providing a devious springboard for further destruction of the wall separating church and state.

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.